

FCC MAIL SECTION

May 5 2 39 PM '93
Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY
MM Docket No. 93-126 ✓

In re Applications of

EDUCATIONAL MEDIA File No. BPED-910924MC
FOUNDATION OF BRYAN/
COLLEGE STATION
(hereafter "Educational Media")
Bryan, Texas
Channel 210A

BRAZOS EDUCATIONAL File No. BPED-920413MF
RADIO
(hereafter "Brazos")
College Station, Texas
Channel 209

For Construction Permit
for a New Noncommercial Educational
FM Station

HEARING DESIGNATION ORDER

Adopted: April 21, 1993;

Released: May 5, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.

2. *Preliminary Matters: Educational Media.* On April 14, 1992, Channel 6, Inc. ("Channel 6"), the licensee of television station KCEN-TV, Temple, Texas, filed a "Petition to Deny or Hold in Abeyance" against Educational Media's application, stating that the applicant "failed to respond to a February 24, 1992 staff letter directing it to demonstrate that it adequately protects KCEN-TV" and that the Commission should either dismiss the application or hold it in abeyance until the information is submitted.¹

3. On May 13, 1992, the applicant amended its proposal to supply the necessary information regarding interference with KCEN-TV and protection to workers and others with authorized access to the tower.² In its July 29 "Supplement to Petition to Deny or Hold in Abeyance," Channel 6

alleges that the Educational Media proposal still does not comply with Section 73.525 because it did not contain the population figures for the entire interference area created by the Bryan proposal. Channel 6 states that this information is necessary because, if TV translator station K63DL, which carries station KDEN-TV, is forced off the air, the NCE-FM must modify its operation to comply with Section 73.525 without the translator adjustment. Without the population figures, claims Channel 6, "the Commission would have no way of determining whether or not the NCE-FM would have to reduce power in the event the translator is taken off the air."

4. The Commission's TV Channel 6 rules 47 C.F.R. § 73.525, reads in pertinent part:

(i) if any part of the predicted interference area is within the Grade A field strength contour (§ 73.683) of a TV translator station carrying the affected TV Channel 6 station, the number of persons within that overlap area will be subtracted, provided the NCE-FM construction permit and license will contain the following condition:

(A) When the TV translator station ceases to carry the affected TV Channel 6 station's service and the cessation is not the choice of the affected TV Channel 6 station, the NCE-FM station will modify its facilities, within a reasonable transition period, to meet the requirements of this section which would have applied if no adjustment to population for translator service had been made in its application.

47 C.F.R. § 73.525(e)(3)(i).

The majority of the interference area will occur within the Grade A contour of translator station K63DL. The number of persons in the interference area outside the K63DL contour is listed as 1197 in the August 13 amendment, well below the maximum of 3000 persons permitted by Section 73.525. Channel 6 does not dispute these figures, but indicates that the applicant must list the population within the entire interference area.

5. Section 73.525 does not require such a submission. Applicants must simply demonstrate that the total number of persons in the interference area, after making the pertinent subtractions, is less than 3000.³ Educational Media has done this. Its application can therefore be granted with the pertinent conditions, and Channel 6's petitions will be denied.

6. *Brazos.* On September 22, 1992, Channel 6 also filed against Brazos a "Petition to Hold in Abeyance, or Alternatively, to Associate Supplemental Information with Application." Channel 6 argues that Brazos should amend its application to specify the number of persons within the proposed Channel 6 interference areas. Channel 6 calculates the number of people to be 76,263 persons, which

¹ On July 29, 1992, Channel 6 filed a supplement to its April 14 petition against Educational Media's application; On August 13, 1992, Educational Media filed an opposition to Channel 6's petition; and, on August 25, 1992, Channel 6 filed a response to Educational Media's August 13 opposition.

² On April 15, the applicant filed a letter stating that while it had been coordinating with its engineers, it had taken longer than 30 days to reach resolution of the matter. The applicant

was given by telephone until May 15, 1992 to file its amendment. The applicant filed an additional technical amendment on August 13, 1992, which purports to "correct an error in the methods used to calculate interference to KCEN-TV, engineering exhibit E-1, at p. 1.

³ For the record, we note that both parties agree that the total number of persons within the interference area is 9499.

it claims is twenty five times the number allowable under 47 C.F.R. § 73.525(c). On September 29, 1992, Brazos filed its "Response" to Channel 6's petition.

7. However, as noted by both Channel 6 and Brazos, Brazos' proposal is in compliance with the Commission's TV 6 restrictions. The entire TV 6 interference area proposed by Brazos is within the Grade A contour of Television translator station K63DL, Bryan, Texas, which carries KCEN-TV. Therefore, the population within the entire interference area may be discounted, and the Brazos application may be granted with the appropriate condition.⁴

8. *Other matters.* Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the station's 3.16 mV/m (70 dBu) contour, but on a showing of good cause may be located outside that contour. Brazos proposes to locate its main studio outside that contour and gives the following justification: Its main studio is to be located within the city of license pursuant to Section 73.1125(a)(3). Accordingly, Brazos is in compliance with the main studio rules.

9. In response to Item 4, Section II, FCC Form 340, Educational Media failed to provide the required exhibit describing how the proposed station will be used, in accordance with 47 C.F.R. Section 73.503, for the advancement of an educational program. However, Educational Media's exhibit no. 1 which was provided in response to Item 2, Section II, FCC Form 301 (requesting a description of the applicants's organizational structure), seems to also describe the information required for Item 4. Additionally, Exhibit II, Educational Media's programming statement, appears to indicate its commitment to advancement of its stated Educational Purpose. Accordingly, Educational Media will not be required to submit an amendment which clarifies this discrepancy.

10. Educational Media amended its application on May 13, 1992, and on August 13, 1992. The amendments were filed after the "A" cut-off-date, the last date for filing minor amendments as of right. However, they were filed in response to a staff request for information dated February 24, 1992. Under Section 73.3514(b) of the Commission's Rules, which governs such responses, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

11. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

12. Neither of the Applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants

would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560, published October 24, 1978. In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a time-sharing issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the Hearing, from participating in negotiation with a view toward establishing a share-time arrangement.

13. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

14. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

16. IT IS FURTHER ORDERED, That the "Petition to Deny or Hold in Abeyance" filed by Channel 6, on April 14, 1992 against Educational Media's application, and, the "Petition to Hold in Abeyance, or Alternatively, to Asso-

⁴ We note that although we will not require the figures, the parties are in agreement as to the population residing in the

interference area.

ciate Supplemental Information with Application" filed by Channel 6 on September 22 against Brazos' application, ARE DENIED.

17. IT IS FURTHER ORDERED, That the amendments discussed in Paragraph 10, above, ARE ACCEPTED to the extent indicated herein.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

19. IT IS FURTHER ORDERED. That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of the Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the dated fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau